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OFFICE OF PETITIONS

In re Application of  
Guy Eden  
Application No. 09/859,660  
Filed: May 16, 2001  
Title of Invention: System and Method for  
Discovering Available Network Components

ON PETITION

This is a decision on the petition filed March 9, 2007 under 37 CFR 1.137(a).

The petition to revive under 37 C.F.R. § 1.137(a) is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 C.F.R. § 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. § 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This above-identified application was held abandoned for failure to timely file a supplemental appeal brief. A Notice of Non-Compliant Appeal Brief pursuant to 37 CFR 41.37 was mailed on September 28, 2006 providing applicant with an extendable one month period for reply. A non compliant appeal brief was submitted on October 30, 2006. A Communication Re: Appeal was mailed on February 15, 2007 informing applicant that the October 30, 2006 appeal brief was dismissed because the supplemental appeal brief failed to comply with the 37 CFR 41.37 (c). Since there were no allowed claims the dismissal of the appeal resulted in the abandonment of the Application.

Petitioner maintains that the supplemental appeal brief submitted on October 30, 2006

made a good faith effort to meet the requirements of 37 CFR 41.37 (c)(1)(v). As such petitioner maintains that there was no valid reason to dismiss the appeal.

**Petition to revive under 37 CFR 1.137(a)**

A grantable petition under 37 C.F.R. § 1.137(a) must be accompanied by:

- (1) the required reply,<sup>1</sup>
- (2) the petition fee,
- (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The instant petition lacks item (3).

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Director that the delay was unavoidable within the meaning of 37 C.F.R. § 1.137(a).

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Director to have been "unavoidable." See, 37 C.F.R. § 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

Petitioner's argument has been considered but is not persuasive. Petitioner's contention that the delay was unavoidable due to a good faith effort to meet the requirements of 41.37 (c) is not well founded. As was conveyed in the March 6, 2007 interview summary, the supplemental briefs submitted failed to overcome the reasons for non-compliance stated in the Notices mailed on September 28, 2006 and October 17, 2006. The "Summary of the Claimed Subject Matter" provided in the October 30, 2006 appeal brief is substantially the same as the section filed in the original brief filed on July 3, 2006. Thus, the Office is not convinced by petitioner's argument. Nor has petitioner presented an argument to explain why the failure to submit a compliant brief

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<sup>1</sup> In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

A delay caused by an applicant's lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered "unavoidable". See In re Sivertz, 227 USPQ 255, 256 (Comm'r Pat. 1985).

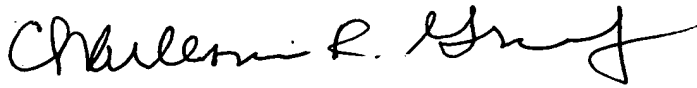
## Alternative Venue

The filing of a petition under 37 C.F.R. § 1.137(b) cannot be intentionally delayed, and therefore, must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 C.F.R. § 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 C.F.R. § 1.137(b).

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Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-3215.

A handwritten signature in black ink, appearing to read "Charlema R. Grant". The signature is fluid and cursive, with a prominent initial "C" and a long, sweeping underline.

Charlema R. Grant  
Petitions Attorney  
Office of Petitions